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## THE DESIRABILITY OF EXPRESSING THE LAW OF PARTNERSHIP IN STATUTORY FORM.

Several years ago the Conference on Uniform State Laws, directed its Committee on Commercial Law to prepare the draft of an act to make uniform the Law of Partnership. The Committee committed the preliminary preparation of the draft to the late Mr. James Barr Ames, Dean of the Law School of Harvard University. Mr. Ames sought and procured permission to draft the Act on what is usually called the entity theory of partnership, and, at the time of his death, the Committee were considering a draft prepared by him on that theory.

On the death of Mr. Ames, at the suggestion of individual members of the Committee, the writer submitted two drafts; one prepared on the so-called entity theory, and the other on the so-called aggregate theory of the nature of the partnership. In the preparation of these drafts, and of the last draft hereafter referred to, the writer has had associated with him Mr. James B. Lichtenberger, one time Gowen Memorial Fellow of the Law School of the University of Pennsylvania, and a member of the Philadelphia Bar. The two drafts first submitted by the writer and Mr. Lichtenberger were considered by the Committee at the meeting held at Chattanooga, Tenn., in August, 1910, and again at the meeting held in Philadelphia last February. The Committee invited to attend its meeting in Philadelphia a number of judges, law teachers, practicing members of the bar, and representatives of commercial bodies. A number of recognized experts on the law of partnership from different parts of the country were present. The opening session was devoted to the discussion of the rival theories of the nature of a partnership, the object being to enable the Committee to determine whether they should proceed with a detailed discussion of the draft drawn on the entity theory or that drawn on the aggregate theory. At the conclusion of the discussion, on the unanimous recommendation of those

present, the Committee proceeded to examine the draft prepared on the aggregate theory, and subsequently passed a resolution, directing me to prepare another draft on that theory for the further consideration of the Committee.<sup>1</sup>

The second draft, thus directed to be prepared, was submitted to the Committee last July, and by them was referred to the Conference at its meeting in Boston in August. The Conference, after a general discussion on the principal sections, at the request of the Committee, recommitted the draft to the Committee for further consideration. The Committee have called a meeting in New York on November 6th and 7th to discuss in detail the draft with the expectation that, as modified by the Committee, it will be submitted for detailed discussion to the Conference at its meeting next summer.

The Legislative Drafting Association, an association formed for the purpose of promoting the scientific preparation of legislation, is co-operating with the Committee by assisting in the effort to have present at its New York meeting those who have made a special study of the subject of partnership in general and of the text of the last draft submitted to the Committee; those responsible for the management of the Drafting Association being fully alive to the necessity of a second thorough preliminary discussion of the entire Act, if a worthy piece of legislation is to be ultimately adopted by the Conference and recommended to the several states.

There are two factors which have led to the desire for a Uniform Partnership Act; the lack of uniformity in the law of partnership in the several states, and its uncertainty in any given state. It is not difficult to demonstrate that uniformity among the several states in the law of partnership is desirable. The business conditions under which partnerships are conducted are similar throughout the United States. There is, therefore, no reason arising from diverse economic conditions in different states why the law of partnership should not be uniform. Uni-

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<sup>1</sup> A pamphlet has been published containing the stenographic notes of the discussions before the Committee at its meeting in Philadelphia, in as far as those discussions related to the theory on which the Act should be drawn.

The writer will be glad to send, on application, a copy of this reprint.

formity of conditions affecting the subject matter raises a presumption in favor of uniformity in law. But the principal reason why uniformity in the law of partnership is desirable, is that a considerable proportion of existing partnerships do business in more than one state. Where a business association intends to carry on its business in more than one state, uniformity in the laws affecting the rights and duties of the members *inter se* and their obligations towards third persons tends to simplicity and certainty. The conduct of a business is a series of acts more or less connected with each other. The fact that some of these acts are performed in one state and some in another, does not lessen the connection between them. A business conducted in Philadelphia and in Pittsburg is no more or less one business because both cities are in the same state than if a state line ran between them. An act in the business intended to have an effect on the business as a whole should have the same effect in all jurisdictions in which the business is carried on. For instance, A and B are in partnership, doing business in Boston and New York. The partnership is to last three years. Before the expiration of this period, A declares that the firm is dissolved; but B, disregarding this declaration on the part of A, continues the business in the name of the partnership. If the law of Massachusetts on the effect of an attempted dissolution contrary to the agreement is in harmony with that of New York, if in New York the business done by B is partnership business, irrespective of notice to third persons of A's attempted dissolution, while in Massachusetts A is regarded as having dissolved the firm, there arises out of this conflict of legal rules a number of intricate legal questions with the result that the law becomes complex and uncertain. Or suppose that A and B being partners, make successive assignments of their rights in certain partnership property located partly in one state and partly in another. If these acts on the part of the partners have not the same legal effect in Massachusetts as in New York, there may, as in the other instance given, arise a confusing and complicated tangle. Illustrations of this kind may be multiplied indefinitely. They show that there are a multitude of acts performed in connection with the conduct

of business by many partnerships that are intended to operate on the partnership relation or affect the partnership property wherever the business is conducted, and that as many partnerships do business in more than one state, to avoid confusion in the law, it is necessary that such acts shall have the same legal effect in all the states.

What is here said in respect to the desirability of uniformity in the law pertaining to partnership, applies equally to the law pertaining to any other business association. Indeed, it may be claimed that other forms of business association, as for instance corporations, being more often used by persons conducting their business with large capital, are more frequently employed where a business is carried on in several states; the very fact that it is carried on in several states usually indicating that it is a large business requiring a large amount of capital. All this may be admitted without detracting from the desirability of uniformity in the law pertaining to that form of association known as the common law partnership. Uniformity in the laws pertaining to other business associations, as limited partnerships, partnership associations, and private business corporations, is also desirable. As to the particular association in which uniformity is most desirable it is not important to our present purpose to inquire. It may, however, be pointed out that the legitimate desire of the public for the regulation of corporations, because of the existence of large corporations tending to monopoly or to protect the investor, will cause, and indeed is already causing, those organizing business of less extensive character to look with greater favor than has been recently the case on the partnership form.

Although, as indicated, uniformity throughout the United States in the law pertaining to partnership is desirable, the uncertainty of our present partnership law in each state is more unfortunate than its lack of uniformity among the several states. This uncertainty is not due so much to conflicting decisions of the courts, as to a confusion, and to what we may call a haziness, in respect to fundamental legal conceptions. A conflict, confusion, or lack of clearness in any fundamental legal conception of necessity renders uncertain any question depending

on it for solution that has not been already passed on, in the exact form in which it is presented, by the courts of the particular jurisdiction in which the question arises. Students of our partnership law have always recognized that the main source of the uncertainty of the present law lies in the fact that the courts have not developed any clear idea of the legal nature of a partner's right in specific partnership property. Another prolific source of uncertainty is the failure to arrive at any clear idea of the legal effect of the retirement of a partner and the continuation of the business by the other partners. The uncertainty of the nature of the partners' right in specific partnership property renders uncertain the right of all those who claim under them; as separate assignees, separate judgment creditors, and, in the case of the death of a partner, widows and heirs. The second source of uncertainty referred to produces unfortunate effects in cases where a conflict arises between those creditors who have extended credit prior to the change in the personnel of the owners of the business, and those who have extended credit subsequent to such change.

Laws that run counter to the economic and social needs of a people, are obstacles in the path of human progress; mill-stones around the neck of a people struggling towards better conditions. But the certainty of the law as well as its adaptation to the needs of society is an end to be desired for its own sake. Indeed there are many subjects in which it is more important that the law should be certain than that it should be settled in one way rather than another. It may be admitted that the law of partnership, so far as it is both certain and uniform throughout the United States, needs little or no reformation to make it correspond to the special needs of the business world for such an organization. But in as far as the law is uncertain, it fails to perform its function. As Lord Coke expressed it: "The knowne certaintie of the law is the safetie of all."

Uniformity of the law of the several states can be promoted by the adoption of the same statutes in each, provided those intrusted with their preparation perform their work with skill and with a knowledge of the importance of discussion and criti-

cism by a group of persons each one of whom is qualified to express an opinion. Hasty codification often raises more questions of doubt and difficulty than it settles. When a poorly constructed statute is adopted by the several states, the actual decisions of the courts of these states may show as much conflict as the previous decisions under the common law.<sup>2</sup> Admitting that the Partnership Act, or other acts adopted by the Conference on Uniform State Laws, will be prepared under conditions from which alone good results may be expected, we have a right to believe that the general adoption of the legislation by the several states will tend to produce practical uniformity in the law.

With uncertainty, however, we have a different problem. Though uncertainty in the law is itself an evil, it does not necessarily follow that it is wise to try and cure that evil by legislative action. The wisdom of an attempt at codification is largely dependent upon the cause of the uncertainty. Now, marked uncertainty in any branch of the law is usually due to one of two causes; a change in the adjustment of economic or social forces,

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<sup>2</sup> See an article by Professor Crawford D. Hening, "The Uniform Negotiable Instrument Law, Is it Producing Uniformity and Certainty in the Law Merchant," *University of Pennsylvania Law Review*, Vol. 59, p. 467. This being the first Act put out by the Conference on Uniform State Laws, it was drafted at a time when the members of the Conference had no adequate appreciation of the time and care which must be devoted to the preparation of such a piece of legislation. As a result, the Act is very far from being, in the opinion of practically all persons who have studied it carefully, a model piece of legislation. The wording of some of its sections have caused different constructions to be placed upon the same words by the courts of different jurisdictions which have adopted it, and Professor Hening has successfully demonstrated that the Act has fallen far short of producing complete certainty and uniformity in the law. He has made no attempt to examine those uncertainties and confusions existing prior to the adoption of the Act, which the Act has successfully rendered uniform and certain. But even if such an examination showed that the Act, taking its effect as a whole, tended to render the law more uniform and certain, it would not detract from the value of Professor Hening's article, which is a practical demonstration of the importance, if codification of any branch of the common law is to be attempted, that the work be undertaken by those who have a full realization of the immense amount of labor—not merely by one person, but by several—that must be expended on the task.

In the opinion of the writer, the more recent commercial acts put forth by the Conference, such as the "Sales Act," "Transfer of Stock Act," "Bills of Lading Act," etc., have been prepared with much greater care and skill, and the result of their adoption by the several States will be a far greater degree of uniformity and certainty in the law affected, than has resulted from the general adoption of the Uniform Negotiable Instruments Act.

or the complexity of the legal problems presented. Where existing uncertainty is due to the first cause, much more harm than good may result from an attempt to end the uncertainty by legislation. At least this last statement may fairly be claimed to be true where, as with us in the United States, there has been so little practical experience in the work of stating in statutory form the rules of private law. For instance, in the seventies and eighties of the last century the rights of combinations of labor in their struggles with employees, and the legal remedies of the employers and employees for the violation of their rights, were uncertain. This uncertainty arose from the fact that the questions involved were new, as the conditions out of which they arose were the products of social and economic forces not previously existing in sufficient strength to make themselves felt. Today, owing to the large number of legal decisions proceeding along definite lines of legal development, most, if not all of the rights of combinations of labor and capital, as far as questions of private law are concerned, have been rendered definite by the courts, and there does not exist a substantial conflict between the various state jurisdictions. At the present time the law expressed in the decisions in trade and labor cases might with advantage be put in statutory form; but the advantage to be gained by such a statute, would not be the greater certainty of the present law as developed by our courts, because, as stated, the law is certain, but the opportunity it might give to the employer and employee to know the limits of their own right and the right of others. Had any attempt been made when the strike and boycott cases first came before the courts, to foresee the questions which would arise and to provide statutory rules for the guidance of the courts, certainty in the law would probably not have been attained in anything like the degree that would have been anticipated, for the questions which have arisen would not in many cases have been foreseen; while in so far as the statutory provisions met the cases which have arisen, the statute, not being the final product of experience, would very probably have expressed rules of law not as well adapted to our present needs as the law which has been actually developed by the courts dealing with each case as it arose.

On the other hand, where uncertainty of the law is due, not to the presence of new conditions, but to the failure of the courts to unravel the complexities of the subject and express with clearness fundamental principles, either the law must remain "in the fog," or a serious effort must be made to solve its difficulties and state its rules in statutory form. The idea, largely prevalent among the legal profession, that the uncertainty of the law, due to a confusion of fundamental ideas and disputes over elementary principles between learned judges and law writers, is necessarily an indication that the law is not ripe for statement in statutory form, shows, it is submitted, an entire misconception of the main function of codification, which is not to put into statutory form all the rules of law that are already clear and certain to every educated lawyer and judge,—that is to those on whom alone falls the duty of its administration,—but to render clear and certain those portions of the law in which the system of development by individual decisions has failed, after ample opportunity, to perform this service. No better example can be given than the law of partnership. Its uncertainty is not due to any new economic and social forces arising to present new untried questions. As we have indicated, it is due to the unfortunate fact that there does not exist and never has existed in our law any definite and accepted idea of such fundamental matters as the legal nature of a partnership, the rights of the members in partnership property, or even their relation to third persons. The causes which make this statement possible, in spite of the fact that for over one hundred years the common law has been administered by two of the foremost commercial peoples of the world, are not difficult to indicate. Our common law system, under which law is developed by the courts through the process of molding principles wrought out by prior decisions to new cases, has two sources of possible weakness.

The judge or judges responsible for the decision of the individual case have rarely made a scientific analysis of the subject as a whole. The effect of the decision, or the reasoning employed to sustain it, on the law applicable to other departments of the subject is necessarily slighted unless the judge is a master

of that particular branch of the law, and no judge under the existing organization of our courts, unless he is judge of such a specialized court as a court of probate, can be master in all, or even any considerable number, of the branches of law affected by his decisions.

Again, the slightest acquaintance with our common law system, shows that it does not tend to develop among members of the legal profession any agreement as to the exact meaning of technical words. Indeed, instead of our legal language gaining in accuracy, in modern times, probably owing to the disappearance of different forms of actions, there has been a steady and marked increase in the possible meanings which may be attached to legal terms, and a consequent increase in the difficulty of conveying by their use the exact meaning intended. Such words as "obligation" and "debt," are excellent examples, but an attempt to analyze almost any legal term will show that it is defective as a vehicle for the communication of exact thought.

Whenever a subject is exceedingly complex, that is whenever it requires for the unraveling of its more difficult problems, close analytical reasoning, the chances increase that these weaknesses in the common law system will prevent the development of a body of law which will be both certain and clear. This is exactly what has taken place in the domain of partnership law, a subject which presents peculiar difficulties. The courts have decided the great majority of the cases in a manner above criticism; but, as indicated, much of the law remains in a state of confusion. A survey of the decisions of the last hundred years shows no evidence of a greater uniformity or even clearness in regard to fundamentals today than in the time of Lord Mansfield. Indeed, with us the very existence of forty odd independent jurisdictions may be said to have increased rather than diminished the difficulty. Of course a hundred and more years of judicial decision has of necessity cleared up many concrete questions; but the fundamental causes of confusion indicated, as well as several minor ones, still remain, and there is no reason to expect that the next ten, or fifteen, or twenty years will make matters any better than they are today. If the law of partnership is to become more

certain than it is, the fundamentals must be rendered clear, and this can only be done, for the reasons given, by the careful statutory expression of rules of law based on clear ideas of fundamental principles.

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